STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

DANIEL HORACEK **No. 152567**
Defendant-Appellant.

L.C. 12-241894-FH
COA No. 317527

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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[1] *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed. 2d 13 (1990).

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Statement of the Question

I.

Where an improper entry into premises occurs and a probable cause-based arrest is made, a statement made outside the premises is not the fruit of the entry but of the probable cause-based arrest, and is not subject to suppression. Defendant's statement was made outside the premises at the station. Even if the entry was improper, and even if the merits of that question are reached, defendant's plea being considered conditional, was the motion to suppress properly denied?

Amicus answers: "YES

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

Where an improper entry into premises occurs and a probable cause-based arrest made, a statement made outside the premises is not the fruit of the entry but of the probable cause-based arrest, and is not subject to suppression. Defendant's statement was made outside the premises at the station. Even if the entry was improper, and even if the merits of that question are reached, defendant's plea being considered conditional, the motion to suppress was properly denied.

Introduction

This court has directed that the parties file supplemental briefs addressing:

- whether exigent circumstances authorized the officers' warrantless entry into the defendant's motel room, *In re Forfeiture of $176,598*, 443 Mich 261, 271 (1993) ("The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.") (citation omitted); see also *People v Oliver*, 417 Mich 366, 384 (1983); and

- if a constitutional violation did occur, whether the defendant is entitled to withdraw his plea, compare MCR 6.301(C)(2) with *People v Reid*, 420 Mich 326, 337 (1984).

Amicus answers that:

- assuming for the sake of argument that a constitutional violation occurred in the entry to arrest, defendant is not entitled to withdraw his plea, because no suppression of evidence in this case would result from any improper entry into the premises, which moots any other issue.

Amicus assumes, *for the sake of argument only*, that the entry here was improper under *Payton v. New York*[2] as warrantless and not justified by exigent circumstances, and that the plea here was conditional. These may be assumed—and not decided—because they are mooted by the fact that the motion to suppress still fails. The motion fails because there is no evidence that was the fruit of the entry.[3]

A. Under *New York v Harris*[4] a statement made outside the place of arrest is not the fruit of any unlawful entry, but the fruit of the probable cause-based arrest

Officers who had probable cause arrest went to Harris's apartment without either a search or arrest warrant to arrest him for a murder. They knocked on the door, displayed their badges and guns, and so he let them enter. He was given Miranda warnings, and confessed to the murder. He was taken to the station, again given Miranda warnings, and gave a written inculpatory statement.

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[2] *Payton v. New York*, 445 U.S. 573,100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980).

[3] The Court of Appeals—in an unpublished, and therefore non-precedential opinion—went at the matter the other way, finding that the plea was *not* conditional, but addressing the merits by finding the warrantless entry into the motel room justified by exigent circumstances. *People v. Horacek*, No. 317527, 2015 WL 5442778, at 3 (2015) ("Based on our disposition, it is unnecessary for us to consider whether defendant's plea was conditional and whether defendant was entitled to withdraw his plea. However, we note that, even assuming the search was unconstitutional, defendant's plea was not conditional pursuant to *People v. Reid,* 420 Mich. 326."). This Court had directed the Court of Appeals to consider "(1) whether the Oakland Circuit Court and the prosecutor consented, tacitly or otherwise, to entry of the defendant's nolo contendere plea to unarmed robbery, conditioned on the defendant's ability to challenge on appeal the trial court's denial of his motions to suppress the evidence and to quash the bindover, see MCR 6.301(C)(2); (2) whether the defendant is entitled to withdraw his plea pursuant to MCR 6.301(C)(2); and (3) whether the defendant's entitlement to relief is impacted by the prosecutor's statement at the plea hearing that any Fourth Amendment violation would be harmless beyond a reasonable doubt because there was sufficient untainted evidence to prosecute the defendant, see *People v. Reid*, 420 Mich. 326, 337, 362 N.W.2d 655 (1984)." *People v. Horacek*, 497 Mich. 872 (2014).

[4] *New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed. 2d 13 (1990).

At issue was the admissibility of the station-house statement.[5] There was no question that "Harris did not consent to the police officers' entry into his home and . . . that the police had probable cause to arrest him." It was also evident that "arresting Harris in his home without an arrest warrant violated the Fourth Amendment" under *Payton*, as the police had no arrest warrant, nor were exigent circumstances present.[6] And so the question was whether the statement taken outside the premises after the warrantless entry was subject to suppression given the unconstitutional invasion of the privacy of the dwelling.

When *Payton* is violated by the entry into a dwelling and a probable cause-based arrest is made in the premises, the arrest is not invalid; rather, it is the *entry*—the invasion of privacy of the premises—to achieve the arrest that is improper. The invasion of liberty that occurs when one's person is seized is justified under the Fourth Amendment where probable cause to arrest exists, but an entry into the premises, the Court said in *Payton*, to accomplish that lawful arrest must be justified by an arrest warrant or exigent circumstances. It is plain that the concern of the Court in *Payton* was not the probable cause-based seizure of the person, itself permissible under the Fourth Amendment, but the entry into the premises to achieve that seizure. The Court emphasized that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed' . . . And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of *that sort*."[7] The Court continued in this vein:

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[5] *New York v. Harris*, 110 S.Ct. at 1642. The first statement was suppressed, and the State did not appeal.

[6] *Id.*

[7] *Payton v. New York*, 100 S. Ct. at1379–1380 (emphasis supplied).

> any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: *the breach of the entrance to an individual's home*. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated.". . . In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line *at the entrance to the house*. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.[8]

And so the question in *Harris*: when the threshold is crossed inappropriately, and the privacy of the dwelling thus invaded, and an arrest of a person within made on probable cause, what is the fruit of the improper invasion of privacy of the dwelling?

Again, before the Court was Harris's station-house statement, made after his probable cause-based arrest in his dwelling which was entered in violation of *Payton*. Referring to *Payton*, the Court said that "Nothing in the reasoning of that case suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest."[9] This is consistent with uninterrupted precedent holding that even an improper arrest does not deprive a court of jurisdiction.[10] Indeed, the arrest of Harris was not unlawful at all—"Because the officers had

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[8] *Payton v. New York*, 100 S. Ct. at1381–1382 (emphasis supplied).

[9] *New York v. Harris*, 110 S.Ct. at 1643.

[10] See *People v. Burrill*, 391 Mich. 124 (1974); *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992); *Frisbie v. Collins*, 342 U.S. 19, 72 S.Ct. 509, 96 L.Ed.2d 541 (1952).

probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house"[11]—it was the *entry* that was unlawful, so that "the legal issue [was] the same as it would [have been] had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house."[12] In that circumstance, physical evidence found in the premises would certainly be subject to suppression, but a statement made by the individual arrested on probable cause would *not* be the fruit of the entry, but of the probable cause-based—and thus constitutional—seizure of the person. The Court thus held that "Harris' statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else." The Court concluded:

> We . . . hold that the station house statement in this case was admissible because Harris was in legal custody, . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else.
>
> To put the matter another way, suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. The warrant requirement for an arrest in the home *is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated.*[13]

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[11] *New York v. Harris*, 110 S.Ct. at 1643.

[12] *Id.*

[13] *Id.*, at 1644 (emphasis added). The statement made *in* the home was not before the Court, but the Court suggested in dicta that a statement made *in* the home after a probable cause-based arrest but improper entry would be subject to suppression. *Id.*

Federal cases have, then, after *Harris* held admissible statements made outside the dwelling by one arrested inside,[14] as fealty to *Harris* requires, as has the Court of Appeals.[15]

B. Defendant's statement outside the motel was not the fruit of the entry and is not subject to suppression under *Harris*

Defendant was bound over on the offense of unarmed robbery for the robbery of a Dollar Value Plus store. The crime —and defendant—were captured on surveillance video. The police entered defendant's motel room to arrest him on probable cause but without a warrant. There were others in the room, and apparently some "narcotics, paraphernalia," but, as defendant said at the motion to suppress, "My client was not charged with anything related to that."[16] No statement from the defendant was taken then, but only later at the police department.[17] Oddly, though counsel had just stated that defendant was not arrested for anything involving narcotics found in the robbery—he was charged with the unrelated robbery of the store—counsel moved to suppress "any and all evidence found in the motel room, because of the illegal entry, and the statement need [sic] to be suppressed."[18] The prosecutor observed that from counsel's written motion it was "a little bit unclear

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[14] See *United States v. Craig*, 630 F.3d 717, 7227-723 (CA 8, 2011); *United States v. Villegas*, 495 F.3d 761, 769–770 (CA 7, 2007); *United States v. De La Cruz*, 835 F.3d 1, 7 (CA 1, 2016) ("the appellant . . . has not contested the existence of probable cause. It follows inexorably—as night follows day—that the appellant was lawfully in the officers' custody when he made the inculpatory statements outside the confines of his home").

[15] *People v. Dowdy*, 211 Mich. App. 562, 568 (1995); *People v. Snider*, 239 Mich. App. 393, 416 (2000).

[16] MT, 4.

[17] *Id.*

[18] *Id.*

as to what he was seeking to suppress,"[19] but from the oral argument it appeared counsel sought suppression of physical evidence found in the room and also defendant's statement. The prosecutor argued that there was probable cause for the arrest, and a "custodial confession following an illegal arrest would not be suppressed [under the case law] so long as there was sufficient probable cause to arrest the defendant," which there was here.[20] The prosecutor also argued that the entry was proper under exigent circumstances.[21] The trial judge found the entry justified by exigent circumstances, and that even if the entry was not constitutional, "I find that there was probable cause to arrest this defendant, [and so] I wouldn't suppress the statement in any event."[22]

Before the plea, defense counsel said that defendant was concerned that the suppression ruling was wrong, and that counsel had "explained to him that I believe that issue is preserved" and the trial judge twice indicated "it is."[23] Defense counsel said that defendant believed he needed a motion to quash to preserve a claim as to the sufficiency of the evidence to bind over and an interlocutory appeal to preserve the entry issue, though counsel believed this unnecessary; the trial judge responded "It is preserved . . . ."[24] When given the opportunity to join in, the prosecutor said "I don't want to get into all of this if then—My position is that even if the Court ruled against me on this Fourth Amendment issue, and the Court has not, the—we'd still be able to proceed because

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[19] *Id.*, 6.

[20] *Id.*, 7. This has not been contested.

[21] *Id.*, 7-8.

[22] *Id.*, 9-10.

[23] *Id.*, 17.

[24] *Id.*, 18.

we have the testimony of the victim, we have the video. And we'd still be able to proceed."[25] Defense counsel said defendant would plead no contest under the court's Cobb's evaluation, but asked the court to state on the record that the Fourth Amendment issue was preserved, as well as defendant's ability to file a motion to quash should he prevail on the motion to quash, and the trial judge answered "Yes, both issues will be preserved for appeal."[26] The defendant then himself said to the trial judge "I'm just trying to protect my right to appeal on this issue of the Fourth Amendment" and the "illegal arrest" and the trial judge said "it's preserved" and that defendant could file a motion to quash in the trial court if the Fourth Amendment ruling was reversed.[27] The prosecutor then waived notice so that a motion to quash could be heard immediately, though defense counsel said that there was no ground for such a motion given the facts adduced at the preliminary examination.[28] Defendant then personally argued the motion, which the court denied.[29] Defendant then pled. During the plea, when advised that any appeal would be by leave, counsel asked "But all the issues are preserved?" and the trial said they were, but that it was up to the Court of Appeals "whether they want to accept your appeal or not."[30]

Under *Harris*, it is plain that any statements defendant made outside the motel room are not subject to suppression *even if* the plea is considered conditional and the issue considered on the

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[25] *Id*., 19.

[26] *Id*., 20.

[27] *Id*., 22-23.

[28] *Id*., 24.

[29] *Id*., 26-34.

[30] *Id*., 38-39.

merits, and *even if* the entry into the motel room to arrest defendant was in violation of *Payton*. Defendant seems to understand this, and avoids the statement altogether, instead saying that "there is no dispute that the officers discovered narcotics and paraphernalia in the motel room. There is also no indication in the record that the right to bring drug related charges against Mr. Horacek was waived. This was still a possibility at the time Mr. Horacek entered into his plea. Mr. Horacek could have reasonably believed that bringing those charges at the same time as the unarmed robbery conviction would make it more difficult for him to prevail at trial. Thus, denial of the motion to suppress this evidence could have reasonably influenced his decision to plea."[31] Defendant's argument thus concerns evidence that is not even arguably pertinent to the charge brought against him, defendant arguing that if *other and different* charges *came* to be brought against him, that evidence—narcotics and paraphernalia—would be subject to suppression. This will not do. If defendant was charged in a different case for a different offense, unrelated to the robbery for which he was charged, he would certainly be free in *that* case to argue for suppression of any evidence sought to be admitted in *that* case. But defendant cites no case—and amicus suggests there is none—that allows consideration of a motion claiming a Fourth Amendment motion on the basis that evidence found in the search or as a product of the entry might be used against the defendant if he were to come to be charged in a different case.

[31] Defendant's reply to answer to application, p. 9 (part III of the answer, titled "The refusal to grant a suppression motion was not harmless").

Only any statements made by defendant are pertinent here.[32] Defendant made no statement inside the premises, and statements made later are not subject to suppression even if the issue is considered on the merits, and even if the entry was improper under *Payton*. That is enough to resolve this case,[33] and leave should thus be denied from the unpublished opinion of the Court of Appeals.[34]

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[32] Defendant also says that "If the government wishes to defeat the motion by establishing that no remedy is available because no pertinent evidence was collected, it is the government's burden to make that showing. See *Anderson*, 446 Mich at 406." Defendant's brief, at 10. *People v. Anderson (After Remand)*, 446 Mich. 392 (1994) does not say *that* at p. 406, or anywhere else. Rather, the point of *Anderson* is that the prosecution has to prove harmless error in the unconstitutional seizure of evidence when its unconstitutional seizure has been shown, but the case does not stand for the proposition that at a motion to suppress defendant does not have to specify that which it is he or she seeks to suppress, and do so with specificity. The defendant referred to narcotics and paraphernalia, and his statement. The former has nothing to do with this prosecution, and the latter is not the fruit of any entry, even if it is conceded for the purpose of argument that the entry was improper. The motion was thus properly denied.

[33] See *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274, 1284 (CA 10, 2015) ("resolving this much is enough work for today"). To the extent the Court considers the questions of exigent circumstances and conditional pleas, amicus joins the brief of the People.

[34] Whether the requirement of *People v. Reid*, 420 Mich 326, 337 (1984) that only outcome-determinative issues may be preserved by a conditional plea should be read into MCR 6.301(C)(2) can await a case where that is determinative itself. *Reid* obviously viewed such a limitation as important. Justices Ryan and Boyle dissented in *Reid* on the ground that litigation was an inappropriate way to establish a rule for conditional pleas; rather, the matter should be subject to publication as a court rule for comment and consideration. 420 Mich. at 353-354. Perhaps publication of a possible amendment to MCR 6.301(C)(2) to incorporate specifically the *Reid* limitation so as to receive input from the bench and bar on the question might be appropriate at this time.

Relief

Wherefore, amicus requests that this Court deny defendant's application for leave to appeal.

Respectfully submitted,

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